IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1171 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MUNRUDDIN WAJIRUDDIN KAZI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1171 of 1998

MR EE SAIYED for Appellant

MS KRISHNA U MISHRA for Appellant

MR BD DESAI APP for Respondent.

CORAM : MR.JUSTICE D.P.BUCH
and
MR.JUSTICE H.H.MEHTA

Date of decision: 01/04/2003

And

02/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

#. This is an appeal under Sec. 374 of the Code of Criminal Procedure, 1973 (for short the "Code") against

the judgment and conviction order dated 7th December, 1998 recorded by the learned Additional Sessions Judge, Court No.25, City Civil & Sessions Court at Ahmedabad (for short "the learned Judge") in Sessions Case No. 172 of 1997 in which the learned trial Judge found the present appellant guilty for the offences punishable under Sec.8-C read with Sec.22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "the said Act") and sentenced him to suffer Rigorous Imprisonment for 10 years and to pay a fine of Rs.1 Lac. in default of payment of fine, the appellant was required to suffer Simple Imprisonment for one year. The trial Court also directed that the muddamal article No.1 be destroyed and muddamal article No.2 be confiscated to the State.

#. The facts of the case of the prosecution against the present appellant may be briefly stated as follows:-

2.1 On 26th May, 1997 at about 6-15 p.m. original informant Mr. P.M.Jadav, Police Inspector of Narcotic Cell, C.I.D. (Crime), Gujarat State, was on duty and as such, he received an information that a person was to pass by the road opposite Odhav Fire Station with Narcotic drugs for the purpose of sale. The said Officer called two panchas and other staff members. They exchanged personal search and thereafter prepared a preliminary panchnama and occupied their position at the aforesaid place. The present appellant was found passing by the said road at about 5-15 p.m. The informant gave a single. Therefore, the present appellant was stopped and inquiry was made about his identity. The Police Inspector Mr. Jadav introduced himself and also told him that the appellant was required to be searched and if the appellant wanted that he be searched in presence of a gazetted officer or a Magistrate, then necessary arrangement would be made to keep the said Officer present. A written intimation to that effect was also given to the appellant. It seems that the appellant agreed that he be searched by Mr. Jadav, and therefore, his personal search was carried out. It is the case of the prosecution that when search was carried out, a narcotic drug was found from the inner pocket of the pant put on by the appellant. The said drug was weighed in presence of panchas. It was sealed and even currency notes of Rs.20/- found from the personal search of the appellant were also seized.

2.2 At that time, it was noticed that the residential house of the appellant was also situated in the vicinity and therefore, the said house was also searched, but nothing objectionable was found from the said house, and

therefore, remaining part of the panchnama was concluded. The papers were sent to the Police Station and First Information Report was filed. Accordingly, an offence was registered against the appellant. Muddamal seized was sent to the Forensic Science Laboratory (for short "F.S.L.") for chemical analysis and opinion. Since the F.I.R. was filed, further investigation was undertaken and on completion of investigation, chargesheet was filed against the present appellant for the aforesaid offences.

#. The learned Judge of the trial Court supplied copies of police investigation papers to the appellant. Charge P.35 was prepared and framed against the appellant. The appellant pleaded not guilty.

#. In the meantime, it was noticed that as per the report of the F.S.L. the narcotic drug found from the appellant was heroin and therefore, the charge was appropriately amended and copy of the amended charge is is at P.37 of the Paper Book. The appellant pleaded not guilty to the said charge also, and therefore, evidence was recorded.

#. At the stage of recording of evidence, the prosecution examined following witnesses:-

(1) P.W.1 Madhavlal Abhayraj Ex.8
(P.S.O. of Odhav Police Station).

(2) P.W.2 Valjibhai Ranchhodji Gohil Ex.13
(First Panch witness).

(3) P.W.3 Ratilal Karamanbhai Ex.14
(Second Panch Witness)

(4) P.W.4 Prakash Mahendrabhai Jadav Ex.15
(Investigating Officer)

(5) P.W.5 Dilipkumar Malabhai Chavda Ex.25
(Police Constable working in Narcotic
Cell)

(6) P.W.6 Ishwarlal Bhimdan Gadhvi Ex.31
(Crime Writer Head, Odhav Police
Station).

(7) P.W.7 Mohmed Faruk Usmankhan Rathod Ex.37
(Police Constable, Odhav Police Chowky
and carrier of Muddamal to F.S.L.)

(8) P.W.8 Prahladbhai Labhshankar Joshi Ex.42

(Assistant Director, F.S.L.)

(9) P.W.9 Rambhai Kalubhai Kumbharwadiya Ex.46
(P.S.I. Vatva Investigation Squad who
subsequently handed investigation
to 2nd P.I. Mr.Paya)

(10) P.W.10 Manoj Dineshchandra Antani, Ex.49
{Superintendent of Police (Economic
Affairs)].

(11) P.W.11 Mohmmed Hanif Ismail Paya Ex.50
(2nd P.I. who completed further investi-
-tation and submitted Chargesheet)

#. After conclusion of evidence, the learned Judge recorded further statement of the appellant under Sec.313 of the said Code. Arguments were heard and thereafter the learned Judge found that the prosecution has proved the entire case against the appellant. Therefore, the appellant was found guilty of the aforesaid offences. He was, thereafter, heard on the point of quantum of sentence, and thereafter, the above said punishment was inflicted on the present appellant.

#. Feeling aggrieved of the said judgment and conviction order recorded by the trial Court, the appellant has preferred this appeal before this Court. It has been mainly contended here that the prosecution has not proved before the trial Court that mandatory provisions of Secs. 42 and 50 and others of the said Act have been complied with. That the trial Court has not properly appreciated the fact that both the panchas have not supported the case of the prosecution. That the trial Court has not properly appreciated the fact that the entry regarding the time at which entry was posted was over-written. That the trial Court has overlooked the legal position that Sec.41 of the said Act was mandatory and yet it has not been complied with. That the trial Court has not properly appreciated the position that there was a delay in taking the accused to the nearest Magistrate and also in sending the muddamal to the Police Station. That the trial Court has also overlooked the fact that there was some difference in the weight of the muddamal article when weighments were taken at two places. That the trial Court has also not properly appreciated the position that the prosecution evidence is lacking on the point as to how the muddamal article was dealt with soon after it was seized but before it was despatched to the F.S.L. That on the whole, judgment and conviction order of the trial Court are illegal and erroneous, deserve to be set aside.

The appellant has, therefore, prayed that the present appeal be allowed, the judgment and conviction order be set aside, the appellant be acquitted of the aforesaid offence and he may be set at liberty forthwith.

#. On receiving the appeal, it was ordered to be admitted but the bail was refused.

#. At the final hearing, Mr. E.E.Saiyed, learned Advocate has advanced arguments on behalf of the appellant and Mr. B.D.Desai, learned APP has argued on behalf of the respondent -State of Gujarat. Both of them have taken us through the oral evidence on record as well as through the documentary evidence which has been produced during the course of the trial. They have also taken us through the legal provisions of the said Act, when they took us through the judgment impugned in this appeal. Mr. E.E.Saiyed, learned Advocate for the appellant has argued first that though initially the charge was framed against the appellant showing that brown-suger was seized from the appellant, the trial Court amended the charge and it was mentioned therein that not brown-suger but Heroin was seized from the present appellant. That therefore, there was apparent mistake in the identity of the muddamal seized from the appellant. That therefore, even the prosecution was not clear as to whether the brown -suger was seized from the appellant, or whether the article seized from the appellant was Heroin. That therefore, the benefit of doubt may be required to be extended to the present appellant.

##. It seems that the above argument is not well -founded. The reason is that if we go through the provisions contained in Standing Order 381 (E) dated 29th May, 1998 issued by the Union of India in exercise of powers conferred by sub-sec.(1) of Sec.52-A of the said Act, it would appear that Heroin is one of the narcotic drugs declared as such by the Union of India.

##. Both the articles or drugs are the same, and therefore, it would not be necessary for this Court to enter into that arena. It is, therefore, clear that the appellant was found in possession of Heroin according to the case of the prosecution, and therefore, there is no change in the case put forward by the State against the appellant. Therefore, this defence will not be helpful to the present appellant.

##. The major attack of the defence is with respect to the non-compliance of Sec.50 of the said Act. Provisions

made in Sec.50 of the said Act may be reproduced for ready reference as follows:-

Sec.50: Condition under which search of persons shall be conducted.- (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

##. If we go through the provisions of Sec.50 of the said Act, it would be clear that when an Officer duly authorised under Sec.42 of the said Act, is about to search any person under the provisions of Secs. 41, 42 or 43 of the said Act, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

##. There is a consistent case law that it is a duty of the Searching Officer to inform the concerned accused as to his right of being searched in presence of the said Officers. In other words, the said right is required to be conveyed to the accused concerned. It is the argument of Mr. E.E.Saiyed, learned Advocate for the appellant that the appellant was not informed by Mr. Jadav that it was the right of the appellant to get himself searched in presence of the aforesaid Officers. That therefore, there was apparent violation of Sec.50 of the said Act. We would, therefore, be required to consider as to whether there was violation of the provisions contained in Sec.50 of the said Act. For this purpose, we may revert to the evidence of Mr. Jadav which is at Ex.15.

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##. The learned Advocate for the appellant has taken us through the evidence of Mr. Jadav at Ex.15. This witness has carried out the search of the appellant in a public place. He has deposed before the trial Court in Para 2 of his evidence that he had inquired from the appellant, if the appellant desired to be searched in presence of a gazetted officer or a Magistrate. He had also offered that in case, the appellant was inclined accordingly, then he would make an arrangement for the presence of the said officers. That the appellant did not show readiness to be searched in presence of the said officers, and therefore, the search of the appellant was carried out by him.

##. In support of the said fact, the said witness has referred to a document at Ex.19 which shows that such a written offer was also made to the appellant by the said witness.

##. The learned Advocate for the appellant has argued that there is some confusion as to who had recorded the alleged reply of the appellant in the said writing at Ex.19. Even if we ignore the said writing, the fact remains that an offer was made orally and in writing and the appellant declined to be searched in presence of a gazetted officer or a Magistrate.

##. It will also be required to be considered that the appellant has produced the F.I.R. at Ex.16 which also shows that such an offer was made to the appellant and the appellant declined to be searched in presence of a gazetted officer or a Magistrate.

##. Then there is the evidence of panchnama Ex.18. there is also a positive mention that said offer was made to the appellant and that the appellant declined to be searched in presence of a gazetted officer or a Magistrate.

##. Therefore, the ocular evidence of the appellant on this aspect has been amply supported by the F.I.R. and the panchnama. It is further supported by written offer Ex.19.

##. An attempt was made to argue that the fact of written offer has not been included or narrated in the F.I.R. as well as in the panchnama. Now when an offer has been made and when it has been referred in F.I.R. as well as in panchnama, then it would not be necessary that the oral and written offers should also have been recorded separately in the panchnama as well as in the F.I.R. Even the fact of offer was not required to be written and referred in F.I.R. as well as in panchnama. However, so far as oral offer is concerned, it has already been referred in the F.I.R. as well as in the panchnama, and therefore, simply because, reference to written offer was not made in F.I.R. and panchnama, it would not mean that no such offer was made to the appellant.

##. It is also required to be considered that Sec.50 of the said Act does not require that an offer should always be put in writing. Therefore, on one hand, there is evidence of the informant Mr. Jadav that oral as well as

written offers were made to the appellant and the appellant declined to be searched in presence of a gazetted officer or a Magistrate. On the other hand, the evidence is supported by F.I.R., panchnama as well as by written offer. Looking to the above evidence on record and considering the observations of the trial Court on this point, we are of the view that the trial Court had sufficient material with it in order to come to a finding that such an offer was made to the appellant by Mr. Jadav.

##. The said oral evidence of Mr. Jadav has further been supported by the evidence of Dilipbhai Malabhai Chavda at Ex.25 who was also a member of the said raiding party. He has positively deposed before the trial Court in his evidence that such an offer was made to the appellant, but he declined to be searched in presence of a gazetted officer or a Magistrate. It is required to be considered that oral as well as written both the offers have been again reiterated by Mr. Chavda during the course of his evidence at Ex.25. This would mean that this witness clearly and categorically corroborated the evidence of Mr. Jadav.

##. In view of above evidence on record, we are of the view that the appellant was offered as aforesaid by Mr. Jadav and the appellant declined to be searched in presence of a gazetted officer or a Magistrate, and therefore, provision contained in Sec.50 of the said Act has been substantially complied with, and therefore, the appellant will not be entitled to any benefit of doubt on this aspect of the case.

##. Then, the learned Advocate for the appellant has referred to the provisions made in Secs.41 and 42 of the said Act. On this line, he has argued that the provisions contained in Secs.41 and 42 of the said Act have not been complied with.

##. For this purpose, it would be necessary for us to look into the provisions made in Secs.41 and 42 of the said Act. It is required to be considered here that the personal search of the appellant was made in a public place. Muddamal heroin has also been seized from the personal search of the appellant which took place in the public place. The said muddamal has not been seized from the house of the appellant, though it was also searched.

##. Now so far as provision contained in sub-sec (1) of Sec.41 of the said Act is concerned, the said provision is not applicable to the facts of the present case since

Mr. Jadav has not obtained any warrant from the Officer mentioned in sub-sec.(1) of Sec.41 of the said Act.

##. So far as provision of sub-sec.(2) of Sec.41 of the said Act is concerned, it has been mentioned therein that any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

##. It is not much in dispute that Mr. Jadav was a Police Inspector at the relevant point of time and was undoubtedly a gazetted officer.

##. For the purpose of dealing with this argument, it would be worth-while to refer to a Notification of the State of Gujarat being Notification No.GH-L.14-NDS-1087 (I)-M, dated 15th June, 1985 hereinbelow:-

In exercise of the powers conferred by Sub-sec.(2) of sec.41 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of all previous orders or notifications issued under Sec.22 of the Dangerous Drugs act, 1930 (II of 1930) and in force in any part of the State, the Government of Gujarat hereby empowers for the purpose of the said Sub-sec.(2) of the following officers of the State Government namely:-

1. All officers of the Police Department of and above the rank of Inspector of Police posted in any part of the State of Gujarat.

2. All Officers of the Prohibition and Excise department in the State of Gujarat of and above the rank of Inspector, Prohibition and Excise Department.

3. All the Inspector appointed under the Drugs and Cosmetics Act, 1940 (XXIII of 1940), in the State of Gujarat.

##. On a bare reading of the said Notification, it is very clear that in exercise of powers conferred on the State Government by Sec.41(2) of the said Act, all officers of the police department of the rank of Inspector of Police, posted in any part of the State of Gujarat has been empowered to act in accordance with Sec.41(2) of the said Act. It means that Mr. Jadav being an officer in the police department of the rank of Police Inspector was covered by the said Notification, and therefore, the said Officer was empowered to act under Sec.41(2) of the said Act, and therefore, it has to be accepted that the provision contained in Sub-sec.(2) of Sec.41 of the said Act has also been complied with.

##. An attempt has been made to argue that under sub -sec.(2) of Sec.42 of the said Act, when any information has been reduced into writing under sub-sec.(1) of Sec.42 of the said Act or when grounds of belief have been recorded under the proviso thereof, then the same should be forthwith sent to the immediate superior officer. The learned Advocate for the appellant has argued that no such information has been forwarded to the superior officer as per the requirement of sub-sec.(2) of Sec.42 of the said Act, and therefore, there is a violation of mandatory provision of sub-sec.(2) of Sec.42 of the said Act.

##. In this respect, it is required to be considered that so far as Sec.42 of the said Act is concerned, it will apply to an officer authorised under Sec.42(2) of the said Act. In the present case, we find that Mr. Jadav was a Police Inspector, and therefore, he was an empowered officer under sub-sec.(2) of Sec.41 of the said Act, and therefore, on a bare reading of Secs.41 and 42 of the said Act, it was not obligatory on his part to convey the said information, reduced into writing by him or convey the grounds of his belief to a superior officer. In other words, if the said officer fails to inform his superior officer about the same, then it cannot be treated that there was a violation of a mandatory provision of either Sec.41 or Sec. 42 of the said Act. We have to draw a demarcating between the

power of Sec.41 and that of Sec.42 of the said Act. Again at the cost of repeatation, it has to be observed that powers under Sec.41 are required to be exercised by an empowered officer and power under Sec.42 of the said Act may be exercised by an authorised Officer. In the present case, power has been exercised by an officer empowered under Sec. 41(2) of the said Act, and therefore, the provision contained in sub-sec.(2) of Sec.42 will not be applied to the facts of the present case on hand.

##. In order to advance the said position, it would be necessary to refer to a decision of this Court. In Aslambhai Ibrahimbhai Memon & Anr. Vs. State of Gujarat reported in 1990(1) GLR 150. A pertinent observation can be gathered from Para 3.12. The said observation may be reproduced for ready reference as follows:-

3.12 "Thus, Sec.42 speaks about search and seizure from any building, conveyance or enclosed place, while Sec.43 speaks about the search and seizure from public place or in transit. It is important to note that the wordings of Secs.41 and 42 with regard to information taken in writing have been deliberately omitted by the Legislature in Sec.43 and in our view, that has been done so advisedly inasmuch as the Police Officer empowered under Sec.42 may get information with regard to the person in any public place or in transit at the last moment and if he has to undergo the procedure of taking that information in writing and recording the reasons for his belief, possibly such information may not be useful. When that is so, whenever any search or seizure is to be made in any public place or in a vehicle in transit or any person is to be arrested or detained from a public place, it is not intended by the Legislature to take down the said information in writing."

##. On going through the said observation of this Court, it is very clear that Sec.42 would apply in respect of a search of a building, conveyance or enclosed place. In other words, it would not apply to a personal search which has taken place in a public place. The provision contained in sub-sec.(2) of Sec.42 would again not come into play since this is a matter of personal search which has taken place in a public place.

##. It is true that after the personal search was over and after the muddamal was recovered, Police Inspector

had also carried out search in respect of a house of the appellant which was just by the side of the place of offence in question but it is also a fact that no incriminating article was found in the said house and nothing was recovered or seized therefrom. Therefore, entire process of search of the house of the appellant is useful for any purpose and even if some violation of some provision has been committed in respect of the search of the house of the appellant, then also it would adversely affect the result of the case.

##. We also find another decision of Narayanaswamy Ravishankar Vs. Asstt. Director, Directorate of Revenue Intelligence, (2002)8 SCC 7, wherein the Hon'ble Apex Court had an occasion to consider the provisions made in Secs.42 and 43 of the said Act and on appreciation of the legal aspect of the case, the Hon'ble Apex Court was pleased to observe in Para 5 as follows:

"In the instant case, according to the documents on record and the evidence of the witnesses, the search took place at the airport which is a public place. This being so, it is the provisions of Section 43 of the NDPS Act which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of section 42 of the NDPS Act is wholly irrelevant. Furthermore, in the mahazar which was prepared, it is clearly stated that the seizure was made by PW 1. The mahzar was no doubt drawn by one S. Jayanth. But, the contention of the learned Senior Counsel that the prosecution version is vulnerable, because Jayanth has not been examined, is of no consequence because it is PW 1 who has conducted the seizure. With regard to the alleged non-compliance of Section 57 of the NDPS Act, the High Court has rightly noted that PW 3 has stated that the arrest of the accused was revealed to his immediate superior officer, namely, the Deputy Director."

##. This observation also makes it clear that in case of a search in public place, provisions contained in Sec. 42 of the said Act will not come into play and the matter would be governed by provisions contained in Sec.43 of the said Act. The Hon'ble Supreme Court has also considered the question of non-compliance, if any, of the provisions of Sec.42 which would not apply to the facts

of the case on hand.

##. Then we can turn to the provisions made in Sec.43 of the said Act. The said provisions may be reproduced for ready reference as follows:-

Sec.43: Power of seizure and arrest in public place.-

Any officer of any of the departments mentioned in Section 42 may-

(a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under Chapter IV relating to such drug or substance.

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV, and, if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation:- For the purpose of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

##. It is very clear that the officer referred in Sec.42 of the said Act has power, function and jurisdiction to seize any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed. Therefore, power of seizure has again been conferred on an officer mentioned in Sec.42 of the said Act. The said officer has also power under clause (b) of Sec.43 of the Act to detain any such person. Therefore, a Police Inspector has a power to search and seize any article found from the personal search of the person concerned. The present officer has exercised the said powers and it

has not been even alleged that he had no power to carry out search and to seize any article recovered from a personal search of the appellant.

##. It has also been contended that entire process has been undertaken in presence of panch witnesses and both the panch witnesses have not supported the case of the prosecution. There is no dispute about the same. The prosecution has examined two panch witnesses -Valjibhai Ranchhodji Gohil and Ratilal Karamanbhai at Exs.13 and 14 respectively. Both have not supported the case of the prosecution. However simply because panch witnesses do not support the case of the prosecution, it does not mean that evidence of other witnesses, if otherwise found reliable, should also be thrown away. Here we find that there was a previous information with Mr. Jadav. He invited the panchas. He prepared a preliminary panchnama. He kept other officers present. When the appellant came near the place of search, the informant had given a signal, and therefore, the personal search of the appellant was carried out and before carrying out his personal search, an offer was made to him, if he wanted to be searched in presence of a gazetted officer or a Magistrate. From the personal search of the appellant, heroin was found in a little quantity. Panchnama was drawn. Article was sent to the F.S.L. and a report was received stating that it was Heroin. Considering the entire evidence of Mr. Jadav supported by other Police Officer present on the spot, it has to be accepted that evidence of Mr. Jadav supported the above F.I.R., panchnama and the evidence of other witness, inspire confidence, and therefore, the trial Court was justified in placing reliance upon the said evidence. In other words, simply because, the panch witnesses do not support the case of the prosecution, it does not mean that the evidence of Mr. Jadav should not have been accepted by the trial Court. In our view, the trial Court was perfectly justified in placing reliance upon the evidence of Mr. Jadav and other Police Officer supported by F.I.R., panchnama and other documentary evidence on record.

##. It has also been argued by Mr. E.E.Saiyed, learned Advocate for the appellant that on one hand, Police Officer retained muddamal with him for quite a long time and on the other hand, it is not very clear as to who had received the muddamal in the Police Station. It seems that while sending other papers to the Police Station, the muddamal Heroin was not sent to the Police Station along with those papers. At the same time, even if we take it that the Police Officer retained the said

muddamal with him for small span of a few hours, then it would not alter the position at all. In our view, simply because the muddamal was retained by the Police Officer for a short period, it does not mean that he has changed the contents of the container. It is more so when seal was affixed and paper slip containing signatures of the panchas was also affixed on the muddamal. Therefore, there was likelihood of change in contents of the container.

##. Moreover, it can be gathered that Mr. Jadav was a Police Inspector, and therefore, it was not illegal on his part to retain the muddamal with him, as he was also authorised under Sec.53 of the said Act. For this purpose, we may refer to the provision contained in Sec.53 of the said Act and we may reproduce it for ready reference as follows:

Sec.53: Power to invest officers of certain departments with powers of an office-in-charge of a police station:-

(1) The Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of the department of central excise, narcotics, customs, revenue intelligence or Border Security Force or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of the offences under this Act.

(2) The State Government may, by notification published in the Official Gazette, invest any officer of the department of drugs control, revenue or excise or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of offences under this Act.

##. It would also be necessary to refer to a Notification of the State of Gujarat bearing No. GH/L/NDS/1087-10577 (iii)-M, dated 15th June, 1985. It would be worth while to reproduce the said Notification for ready reference as follows:-

In exercise of powers conferred by sub-sec.(2) of Sec.53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of all previous orders or notifications, issued under Sec.22 of the Dangerous Drugs Act, 1930 (II of 1930) and in force in any part of the State, the Government of Gujarat hereby invests the following officers

with the powers of an officer, in charge of a Police Station within the limit of their respective jurisdiction for the investigation of an offence, under the said Act, viz. (1) All officers of Prohibition and Excise Department, in the State of Gujarat, of an above the rank of a Sub-Inspector (2) All the Inspectors appointed, under Sec.21 of the Drugs and Cosmetics Act, 1940 (XXIII of 1940)."

##. The said Notification clearly empowers all officers of Prohibition and Excise Department, in the State of Gujarat, of an above the rank of a Sub-Inspector appointed under Sec.21 of the Drugs and Cosmetics Act, 1940. In other words, as per the said Notification of the State of Gujarat, Inspectors appointed under Sec.21 of the Drugs and Cosmetics Act, 1940 have been conferred with powers of Sec.51 of the said Act. Looking to the said Notification, it is amply clear that the Police Inspector was empowered and authorised to retain muddamal with him.

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##. However this aspect would lose its significance, when it is quite true that the muddamal was subsequently handed over to the Police Station concerned.

##. Then there is also a reference made during the course of arguments to the provisions contained in Sec.52 of the said Act. Sub-sec.(1) of Sec.52 of the said Act makes it clear that person arrested under Secs. 42, 43 or 44 shall be informed about grounds of his arrest. It is not in dispute that this provision was complied with. At the same time, in case of Aslambhai Ibrahimbhai Memon & Anr. Vs. State of Gujarat, 1990 (1) GLR 150 (supra), it has also been observed that when a person is required to face a trial, it would not be technically necessary to inform him about grounds of his arrest.

##. Sub-sec.(2) of Sec.52 of the said Act also states that such a person is required to be sent to a Magistrate by whom the warrant was issued. In the present case, the appellant was not arrested under warrant of a Magistrate, and therefore, on a bare reading of sub-sec.(2) of Sec.52 of the said Act, it was not necessary on the part of the Police Inspector or Police Station Officer to forward the appellant to a Magistrate. Even otherwise, the said provision has been complied with, in spirit and substance. It is not in much dispute that the appellant

was presented before the Magistrate.

##. Sub-Sec.(3) and (4) of Sec.52 also require that the person arrested under Secs. 41,42 or 44 of the said Act be forwarded to the nearest police station or to the officer empowered under Sec.53 of the said Act. Now as stated above, the Police Inspector himself was an officer empowered under Sec.53 of the said Act. Moreover, the provision has been complied with inasmuch as the appellant was forwarded to the police station concerned. For this purpose, we can refer to the document at Ex.17 which seems to have been addressed to the Police Station Officer of the Odhav Police Station. On going through the said document, it becomes clear that the custody of the appellant accused was handed over to the P.S.O. of the said Police Station along with other papers and even the muddamal article was also sent to the said Police Station. It means that the above provision has been complied with, in substance and spirit also. So on one hand, there is oral evidence to show that the appellant and the muddamal article both were forwarded to the Police Station. On the other hand, the said oral evidence is further supported by the aforesaid documentary evidence.

##. It has also been argued on behalf of the appellant that there was some difference in the weight of the muddamal article. Therefore an attempt was made to argue that the muddamal was subsequently changed.

##. So far as oral evidence is concerned, Mr.Jadav at Ex.15 has deposed before the trial Court that muddamal seized from the appellant was weighed and it was found to be 7 Gms.- 10 Mgms. The said fact is also stated in the F.I.R. filed by him and produced by him at Ex.16. The said fact is further mentioned in communication sent to the Odhav Police Station at Ex.17. Even the panchnama Ex.18 also shows the said fact.

##. However, it was noticed by the F.S.L. that the muddamal received by the F.S.L. did not weigh 7 Gms. 10 Mgms. but it was 6 Gms.-600 Mgms. Therefore, it has been argued that the muddamal article seized from the appellant was subsequently changed or there was atleast a reasonable doubt about the same, and therefore, the appellant should be entitled to the benefit of doubt.

##. For this purpose, we may refer to a letter written by the F.S.L. to the Police Inspector of Odhav Police Station which has been produced at Ex.45. Here it has been mentioned that net weight of the muddamal was found

to 6 Gms.-600 Mgms. whereas in the communication sent by the Police Station, it was shown to be 7 Gms.-10 Mgms. It is also stated in the letter that difference in weight may be taken note of.

##. The learned Advocate for the appellant has argued that despite the said difference in weight, the Police Inspector did not send any explanation as to why there is difference in weight. Now letter Ex.45 did not require Mr. Jadav to clarify the position. It is simply an intimation given by the F.S.L. to the Police Station Officer about the difference found in weight. No explanation was sought for, and therefore, there was nothing wrong done by the Police Station nor by Mr. Jadav by rendering no explanation about difference in weight.

##. At the same time, it is also required to be considered that the prosecution has examined the Officer from the F.S.L. as a witness of the prosecution. Prahladbhai Labhshankar Joshi Ex.42 has tendered his evidence stating that he was working as Assistant Director in the Office of the F.S.L. at Ahmedabad between the year 1993 and 1997. He has also stated that he had received the aforesaid muddamal article and on carrying out weighment, net weight was found to be 6.600 Gms. His evidence is supported by other documentary evidence on record. Therefore, there cannot be any doubt about the evidence given by the said witness. Even the document produced by him purporting to be a report also shows that the net weight of the said article was 6.600 Gms.

##. For this purpose, apart from the evidence of Mr. Jadav, we can refer to F.I.R. Ex.16 filed by Mr. Jadav. In the said F.I.R. it has been mentioned by Mr. Jadav that the article seized from the personal search of the appellant was found to be brown-suger and weighment was taken of the said brown-suger with plastic (polyethylene) bag. A combined weight was found to be 7.10 Gms. and the value thereof was estimated at Rs.7,100/-.

##. Then, we can turn to the panchnama Ex.18. Second part of the panchnama Ex.16 (Page 121) clearly shows that when weighment was taken, it was found to be 7.10 Gms. when it was weighed with plastic (polyethylene) bag. It seems that the F.S.L. has clearly shown net weight at 6.600 Gms. So on one hand at one place weighment was taken of brown-suger with plastic (polyethylene) bag and at another place, net weight of brown-suger was taken, and therefore, there appears to be

some marginal difference in weight stated in the panchnama, in F.I.R. and in oral evidence of Mr. Jadav as against the report of the F.S.L. Since at one place, the weight includes weight of polyethylene bag and at another place, it is a net weight of the contents.

##. Even otherwise, the difference between the two is marginal and without any significance, and therefore, the appellant cannot get benefit of doubt on mere assertion that there was difference in weight, and therefore, there is likelihood of change in contents of the container.

##. Then, it has also been contended that seal was not properly affixed and there is some change in the description of seal affixed on the muddamal article. For this purpose, the learned Advocate for the appellant has referred to the report of the F.S.L. Ex.43. At Page 193 of Record and Proceedings, the description of seal has been mentioned as follows:

"P.I. N.D.P.S. C.I.D. CRIME G.S. A'BAD "

##. It is required to be stated here that as per the said document (Page 193) at Ex.43, the seal was intact and it was as per specimen seal.

##. Then, we can turn to the next document at Page 195 of Record and Proceedings at Ex.44. The description of the seal has been shown as follows:

"P.I. N.D.P.S. G.S. A'BAD. C.I.D. CRIME."

##. On the backside of the said document, there is a specimen seal affixed on the letter itself. From the said specimen seal, it can be read as follows:

"P.I. N.D.P.S. G.S.A'BAD. C.I.D. CRIME."

##. The said seal is a round seal and there, the above letters have been written in a circular manner. Letters "P.I. N.D.P.S." are found on the upper part of the circle and "C.I.D. CRIME" appears to be on the bottom of the circle. Then, we find "G.S. A'BAD" in the middle of the circle.

##. Therefore, if upper part and lower part of the circle are read together, then G.S. A'BAD may not find place after said upper and lower parts of the said circle. On the other hand, if upper part is written first and if it is followed by middle part and lower part, then the description may be little different. At

the same time, it is also required to be considered that if A'bad is written at that place and if the seal shows A'BAD, then in that case it has to be accepted that the letter A'BAD is meant for Ahmedabad, and therefore one has not to be too technical in reading the description of the seal. In the premise, it cannot be said that the seal on the muddamal article was not proper, and therefore, there was likelihood of change in the contents of the container.

##. It has also been argued by the learned Advocate for the appellant that the conduct of the appellant at the time of commission of alleged offence is always relevant and important. It is also argued that though the appellant could see the Police Officers around him, he did not make any attempt or effort to run away from the spot. Sometime, it so happens that accused person may be frightened and he may not think of running away. Sometime, accused person does not get any opportunity of running away. Sometimes, police officers are so near that the accused person may not get a chance to run away and sometime, accused may have been apprehended without any anticipation, and therefore, he may not be in a position to run away. In the present case, simply because the appellant did not or could not run away, it would not be a point in favour of the appellant.

##. It has also been argued that in the present case, two witnesses have been examined by the prosecution as additional witnesses, and therefore, defence of the appellant has been adversely affected. It is true that two witnesses have been examined as additional witnesses by the prosecution on permission granted by the court concerned. However at the same time, looking to the evidence given by those witnesses, it is not possible to accept that the defence of the appellant has been adversely affected by examination of the said two witnesses. This can be gathered from two applications submitted by the prosecution. First witness examined as additional witness is the Writer Head Constable Mr. Gadhvi. The application is at Ex.29. Second witness is the Superintendent of Police Mr. Antani. So far as Mr. Antani is concerned, his evidence is to the limited fact that he is an Officer who had received a little communication from Mr. Jadav. Any way, the appellant had all opportunities to cross-examine the said witness and records do not show that the appellant had made a request to recall other witnesses in light of the background of evidence tendered by the said two additional witnesses. Therefore, if the appellant wanted to further cross-examine the witnesses already examined,

then it was open to him to submit proper application before the trial Court but that has not been done. This shows that no prejudice has been caused by examination of said two additional witnesses. It is more so when Sec.311 of the said Code provides for powers of the Court to permit examination of additional witnesses.

##. Even otherwise, if we go through the trial Court records, it is very clear that the prosecution examined P.W.1 Madhavlal Abhayraj at Ex.8 who was working as First Grade Jamadar and was in charge of the Odhav Police Station at the relevant point of time. He had received F.I.R. which was filed at 9-15 p.m. He has also produced relevant entries from the Station Diary.

##. Then, there is evidence of P.W.2 Valjibhai Ranchhodji Gohil Ex.13 who was a first panch witness and he has not supported the case of the prosecution. Similar is the case of P.W.3 Ratilal Karamanbhai who was also a panch witness and who has also not supported the case of the prosecution.

##. Then, P.I. Mr. Prakash Mahendrabhai Jadav Ex.15 has deposed before the trial Court that he had received previous information and on the basis thereof, he interrupted the appellant going on the road in front of the Odhav Fire Station. He has also deposed that the personal search of the appellant was carried out in presence of panchas after an offer, if he wanted to be searched in presence of a magistrate or a gazetted officer. That the appellant declined to accept the said offer of being searched in presence of a gazetted officer or a Magistrate. That on personal search of the appellant, the above muddamal was seized which was sent to the Police Station and thereafter to the F.S.L. His evidence is supported by F.I.R. and panchnama and written offer to the appellant referred to hereinabove.

##. The argument was also advanced by the learned Advocate for the appellant that there was an over-writing in respect of an entry made in the Police Station. The said entry can be gathered at Ex.21 on the record of the trial Court. Therein, it is found that initially timing was shown as 3.30 and thereafter there was an over-writing on it and instead of 3-30, it can now be read as 15-30. It has, therefore, been argued that there was subsequent alteration in the timing recorded in the said document Ex.21.

##. It seems that initially the timing was recorded as 3-30 which would mean 3-30 p.m. which was changed to

15-30 hours. It seems that in Police Station, hours are written from 12 midnight to 12-00 midnight. Therefore, it seems that at one point of time, the time was written as 3-30 p.m. Concerned Officer appears to have noticed that practice is different, and therefore, in place of 3-30, 15-30 was written, and therefore, there is an over-writing of 5 over 3. Over-writing cannot be disputed but the explanation as aforesaid is required to be accepted, and therefore, it can be said that there was no dishonest intention on the part of the Officer concerned in making change in the said timing. Therefore, it does not adversely affect the case of the prosecution. It is more so when in the main entry, again it has been recorded as 3-30 p.m. So the over-writing in Column No.2 would lose its significance when again 3-30 has been mentioned in Column No.4.

##. Then, P.W.5 Dilipkumar Malabhai Chavda Ex.25 was also a witness who accompanied the said Police Inspector. He has clearly supported the case of the informant that the above muddamal was seized from the personal search of the appellant.

##. Ishwarlal Bhimdan Gadhvi was subsequently examined at Ex.31. He has stated that muddamal was given to Police Constable Mohmed Farook Usmankhan Rathod for being carried to F.S.L. He has also stated during the course of his evidence that after the raid, the muddmal was handed over to the Police Station Officer, and thereafter, it was entrusted to him and in the meantime, the muddamal was lying with the P.S.O. It seems that the said evidence did not meet with serious cross-examination.

##. Mr. Mohmed Farooque Ex.37 has deposed before the trial Court that he had taken the muddamal to the F.S.L. An attempt was made to show that he did not remember as to the Officer of F.S.L. to whom the muddmal was delivered.

##. Now, it is a fact that the muddamal was handed over by him in May, 1997 and his evidence was recorded after about one year. Moreover, once the muddadmal is handed over to the concerned Officer of the F.S.L., he was not expected to remember the name of the said Officer. Therefore, simply because he did not remember the name of the said Officer, his evidence cannot be treated to be not reliable.

##. Then, P.W.8 Prahladbhai Labhshankar Joshi Ex.42 was the Assistant Director of F.S.L. whose evidence has been

referred to above and who has clearly deposed that net weighment of muddamal was undertaken and it was found to be 6.600 gms. He has given details as to how the muddamal was tested in his Laboratory.

##. Then, P.W.9 Rambhai Kalubhai Kumbharwadiya Ex.46 had undertaken investigation of the case for some time and thereafter he had handed over the investigation to Second P.I. Mr. Baya.

##. Then, Manoj Dineshchandra Antanai Ex.49 is the Superintendent of Police (Economic Offences). He has tendered his evidence before the trial Court in order to show that a written information was received in his Office and has proved the said fact that his Officer had received the said written information sent by the concerned Police Inspector.

##. Mohmmed Hanif Ismail Paya examined at Ex.50 was the Investigating Police Officer who had accepted the investigation from Mr. Kumbharwadiya and had submitted chargesheet against the appellant.

##. We have also gone through further statement of the appellant recorded under Sec.313 of the Cr.P.C. and it is found that except stating that the fact is incorrect, no positive statement has been made by him.

##. The appellant was not required to make any positive statement before the trial Court, and therefore, no adverse inference is required to be drawn. Though he has not made any positive statement before the trial Court, we also do not propose to draw any adverse inference against the appellant.

##. It has been further argued by the learned Advocate for the appellant that Police Inspector did not comply with the requirements of Sec.52A of the said Act.

##. On going through sub-sec.(1) of Sec.52A of the said Act, it becomes clear that the said provisions will apply to a case wherein the substance or drug seized is hazardous in nature or wherein there is a scope of theft of substance etc. while keeping and storing the same. In the present case, we find that the article seized from the appellant was not of the nature mentioned in sub-sec.(1) of Sec.52A of the said Act, and therefore, the question of disposing of the said muddamal article did not arise at the time of its seizure.

##. Sub-sec.(2) of Sec.52A of the said Act will apply

when any narcotic drug or psychotropic substance has been seized and forwarded to the Officer in charge of nearest Officer empowered under Sec.53 of the said Act. Looking to the quantity of muddamal seized, question of disposal pending trial did not arise, and therefore, it cannot be said that Police Inspector had committed violation of mandatory provisions of the said Act. Therefore, the proceedings would be vitiated on the ground that the muddamal was not disposed of by the Police Inspector at the relevant point of time. In fact, the muddmal was required to be sent to F.S.L. for appropriate analysis and looking to the quantity of the muddamal, there was absolutely no justification for disposal of the same pending trial.

##. It was also argued on behalf of the appellant that the Police Station Officer ought to have affixed his own seal on the muddamal article seized from the appellant. It is found from the record that there was a seal on the muddamal article as described hereinabove. The Officer concerned was an empowered officer, and therefore, in our view, it was not necessary for the Police Station to affix a separate seal of its own. It is more so when the Muddamal article was sealed with the seal of the empowered officer as described hereinabove. Therefore, there is no infringement committed by the officer in charge of the Police Station, and therefore, there is no illegality committed by him in preserving the muddamal article in the Police Station.

##. In view of the above matter, we are of the opinion that the trial Court was justified in holding the appellant guilty of the offence in question. The trial Court has given convincing and cogent reasons in arriving at a finding that the appellant is guilty. We find no merit or substance in the present appeal. We also find that no procedural illegality has been committed by the trial Court. We also find that there is no error committed by the trial Court in appreciation of evidence on record. When we find that the appeal is without any merit, the same is required to be dismissed.

##. For the foregoing reasons, the appeal of the appellant is ordered to be dismissed. The judgment and conviction order recorded by the trial Court are confirmed.

Date: 2/4/2003. ----
ccshah (D.P.BUCH, J.)

(H.H.MEHTA,J.)